Mandatory Set-Asides as Land Development Conditions

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WHILE LOCAL GOVERNMENTS should be congratulated for recognizing and attempting to address what has become a national affordable housing supply crisis, they may only do so by constitutional means. Increasingly, local governments address the issue of affordable housing by means of mandatory set-asides of a percentage of affordable or workforce housing, applied to private development.

Most attempts at mandatory set-asides suffer from several defects. First, they often "exact" the workforce or affordable housing increments at an inappropriate and unconstitutional stage in the land development process: rezoning. The premise upon which any and all legal land development conditions—exactions, dedications, impact fees, in lieu fees—rests is that they are development driven; the contemplated project will require public facilities for which the landowner or developer must contribute a fair share.

> [I]t is generally agreed that the law applicable to impact fees, exactions, and in lieu fees, as well as to compulsory dedications, is similar, given that they all represent land development conditions *levied at some point in the land development process, such as subdivision plat approval, shoreline management permit application, building permit application, occupancy permit application, or utility connection.*[1]

Rezoning, while it may be a necessary precedent to land use and development, neither creates nor drives the need for public facilities, including affordable housing. It is therefore unconstitutional to require

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1. DAVID L. CALLIES, DANIEL J. CURTIN JR. & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 6 (2003); *accord* MANDELKER, LAND USE LAW § 9.11 (5th ed. 2003).

exactions of any kind as a condition for change of use by means of zoning map amendments (rezoning):

> Finally, we note again that such land development conditions—whether dedications, exactions, or impact fees—are development driven. Without a demonstrable and relatively immediate need for such facilities it is unconstitutional to "charge" them. Therefore, levying such land development conditions *on rezoning alone is almost certainly unconstitutional. The fees and other conditions should be levied or charged at some development permit or subdivision approval step, rather than as conditions for land reclassification.*[2]

Second, unless the local government can demonstrate a clear rational and proportional nexus between market price development and the imposition of below-market cost housing set-asides, it may not require these set-asides at any stage in the land development process. What scant precedent exists for imposing such exactions on residential developments does so only when the local government requiring such exactions provides a series of meaningful bonuses to help offset the cost of the mandatory affordable housing set-asides. As to the imposition of such costs on non-residential development, the local government must demonstrate that the development generates a need for such housing, generally of the workforce variety, and that the amount to be set aside is proportionate to that need. As one commentator recently noted in the commercial housing set-aside context:

> A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower-income groups or to a municipal fund for the construction of such housing. [Such] programs satisfy the nexus test only if the municipality can show that downtown development *contributes to the housing problem the linkage exaction is intended to remedy.*[3]

I. Mandatory Affordable Housing (Linkage): Herein of Authority, Constitutionality and Retroactivity (Vested Rights)

By way of background, "[t]he broad concept of linkage describes any of a wide range of municipal regulations that condition the grant of development approval on the payment of funds to help finance services and facilities needed as a result of development."[4] "In the context of developing affordable housing, linkage refers to any scheme that requires developers to mitigate the adverse effects of non-residential develop-

2. DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 254 (4th ed. 2004).
3. MANDELKER, LAND USE LAW, *supra* note 1, at § 9.23 (emphasis added).
4. Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 284 (N.J. 1990).

ment upon the shortage of housing either indirectly, by contributing to an affordable-housing trust fund, or directly, by actually constructing affordable housing."[5] Mandatory affordable housing requirements or linkage fees in lieu of housing raise two basic takings issues. The first issue is whether such fees pass scrutiny under the Supreme Court's "essential nexus" test set out in *Nollan v. California Coastal Commission*.[6] The second issue is how the "rough proportionality" test of *Dolan v. City of Tigard*[7] applies.

As noted in a standard treatise on land use, "[t]here is some authority for the use of set-asides and other housing exactions and fees to provided needed low income housing, but whether this is a sufficient basis for nexus, let alone proportionality, to stave off a constitutional challenge, is not clear."[8] Indeed, as another treatise observes, "[W]hen the provision of lower-income housing is not linked to housing subsidies, *zoning incentives may be necessary to absorb losses incurred by the developer on the lower-income units. Density bonuses are a possibility, and the ordinance can also relax sited development requirements.*"[9]

A. *Authority*

Before addressing the constitutional issues, there is the initial question of authority for housing set-asides or exactions. Thus, for example, Hawaii's impact fee statute[10] does not apply to housing linkage fees, and, indeed, expressly excludes such fees from the authority granted to Hawaii's four counties to levy impact fees for public facilities: "impact fees may be imposed only for those types of public facility capital improvements specifically identified in a county comprehensive plan or a facility needs assessment study."[11] However, the statute defines "impact fees" as

5. *Id.; accord* MANDELKER, LAND USE LAW, *supra* note 1 at § 9.23 ("A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower-income groups or contribute to a municipal fund for the construction of such housing." (footnote omitted)); Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1012 (1991) ("Housing linkage programs require or offer inducements to private developers to produce affordable housing or to pay a sum for development of affordable housing into housing trust funds."); John A. Henning Jr., Comment, *Mitigating Price Effects with a Housing Linkage Fee*, 78 CAL. L. REV. 721, 722 (1990) (linkage fees are a form of exactions that levy "fees on downtown office development to subsidize low- and middle- income housing" (footnote omitted)).

6. 483 U.S. 825, 837 (1987).

7. 512 U.S. 374, 391 (1994).

8. ZONING AND LAND USE CONTROLS, ch. 9, § 9.06 (2007).

9. LAND USE LAW, vol. 1, ch. 7, § 7.27 (2006) (emphasis added).

10. HAW. REV. STAT. §§ 46-141 to -148 (2006).

11. *Id.* § 46-142(b).

> the charges imposed upon a developer by a county or board to fund all or a portion of the *public facility capital improvement costs* required by the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development.[12]

That same section also defines "public facility capital improvement costs" and explains that such costs "do not include expenditures for *required affordable housing*."[13] Moreover, the statute imposes nexus *and* proportionality requirements, providing that "[a]n impact fee shall be substantially related to the needs arising from the development and shall not exceed a proportionate share of the costs incurred or to be incurred in accommodating the development."[14] It is therefore not at all clear that Hawaii's counties have the power or authority to require workforce (affordable) housing as a condition of land development approval.

While Hawaii courts have not ruled on this issue, a Virginia court has done so. In *Kansas-Lincoln, L.C. v. Arlington County Board*[15] the court found that the county lacked both the authority to require a developer to provide affordable housing as part of the land development process at the zoning stage, and the authority to require an affordable housing contribution as part of the site plan approval process.[16] The court found that the requirement was outside the legislative authority granted to Arlington County by the Virginia General Assembly and was, therefore, illegal and invalid.

To the same effect is an earlier decision—again from Virginia—*Board of Supervisors v. DeGroff Enterprises*.[17] There, Fairfax County amended its zoning ordinance to require "the developer of fifty or more dwelling units in [several] zoning districts . . . to commit himself, before rezoning or site plan approval to build at least 15% of these dwelling units as low and moderate income housing. . . ."[18] The trial court found that the amendment was invalid on the grounds that the Board of Supervisors exceeded its authority under the state's zoning enabling act, the amendment was an improper delegation of legislative authority, and the amendment was arbitrary and capricious. On appeal, the Supreme Court of Virginia agreed:

12. *Id.* § 46-141 (emphasis added).
13. *Id.* The legislative history of HAW. REV. STAT. § 46-141 does not explain what is meant by "required affordable housing."
14. *Id.* § 46-143(c).
15. 66 Va. Cir. 274 (Cir. Ct. 2004).
16. *Id.* at 286.
17. 198 S.E.2d 600 (Va. 1973).
18. *Id.* at 601.

> [T]he zoning enabling act does not authorize the governing body of a county to control compensation for the use of lands or the improvements thereon . . . The amendment . . . exceeds the authority granted by the enabling act to the local governing body because it is socio-economic zoning and attempts to control the compensation for the use of land and the improvements thereon . . . Of greater importance, however, is that the amendment requires the developer or owner to rent or sell 15% of the dwelling units in the development to persons of low or moderate income at rental or sale prices not fixed by a free market. . . .[19]

While both of these Virginia cases deny local governments the authority to implement inclusionary zoning ordinances, the Virginia legislature has enacted statutes that now allow local governments to require affordable housing set-asides or in-lieu fees.

Furthermore, other jurisdictions have taken a more direct route in granting local governments the authority to enact inclusionary zoning ordinances. In a challenge to an ordinance imposing mandatory affordable housing fees on commercial developers as a condition on development, a New Jersey appellate court stated that a "mandatory development fee applied indiscriminately as a price to build within the municipality has no real and substantial relationship to the regulations of land."[20] However, the New Jersey Supreme Court reversed, finding that even though the state's zoning enabling act did not expressly grant municipalities the power to impose affordable housing fees, municipality's police powers enable them to take action "as it may deem necessary and proper for the good government, order and protection of persons and property and for the preservation of the public health, safety and welfare."[21] The court then stated that "[a] municipality in the exercise of its police power clearly may seek to address housing problems."[22] In so holding, the court noted that the fee not only served the public welfare but also had a real and substantial relationship to the regulation of land.[23]

Relying on *Holmdel Builders Association*, a Connecticut court upheld an ordinance that "require[d] [property] owners who convert residential units into non-residential uses, or who demolish residential housing, to either replace the converted or demolished housing stock . . . or to make a contribution to [a] low income housing fund. . . ."[24] The court

19. *Id.* at 602.
20. Holmdel Builders Ass'n v. Twp. of Holmdel, 556 A.2d 1236, 1242 (1989), *aff'd in part, rev'd in part*, 583 A.2d 277 (1990).
21. *Holmdel Builders Ass'n*, 583 A.2d at 286.
22. *Id.*
23. *Id.*
24. Gagne v. City of Hartford, No. CV 890358802S, 1994 WL 16841, at *1 (Conn. Super. Ct. Jan. 4, 1994).

noted that in *Holmdel* the enabling statute never expressly authorizes imposition of development fees but implicitly the statute grants towns the authority to require these fees in order to "provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of its fair share."[25] Although the state legislature never directly granted the City of Hartford the authority to enact the ordinance, the city argued that the ordinance was authorized by the broad powers given to municipalities under state law.[26] The court agreed that section 7-148 granted the City of Hartford the implied power and authority to require owners to replace residential property or to pay a fee to provide for replacement housing.[27]

It is worth noting, however, that New Jersey—virtually alone among the 50 states—has a well-developed common law that imposes fair share affordable housing requirements on local governments (note: not developers) as a matter of state constitutional law.[28]

B. *A Constitutional Overview*

While much of the recent case law dealing with such conditions and exactions has developed from challenges to impact fees, the language is applicable to all three. To be enforceable and valid, an impact fee must be levied upon a development to pay for public facilities, the need for which is generated, at least in part, by that development.[29] This is the

25. *Id.* at *3 (quoting *Holmdel Builders*, 583 A.2d at 573).

26. *See* CONN. GEN. STAT. § 7-148 (2010) which grants municipalities the power to:

1. Provide for the financing, construction, rehabilitation, repair improvement or subsidization for lower- and moderate-income persons and families;
2. Make rules relating to the maintenance of safe and sanitary housing;
3. Regulate the mode of using and building when such regulations seem expedient for the purpose of promoting the safety, health, morals and general welfare of the inhabitants of the municipality; and
4. Make and enforce police, sanitary or other similar regulations and protect or promote peace, safety, good government and welfare of the municipality and its inhabitants.

27. *Gagne*, 1994 WL 16841, at *3.

28. For an overview and development of New Jersey's common law, see the trio of decisions known as the Mount Laurel cases, *S. Burlington County NAACP v. Township of Mt. Laurel*, 290 A.2d 465 (N.J. 1972), *modified by*, 336 A.2d 713 (1975), *rev'd*, 456 A.2d 390 (1983).

29. CALLIES ET AL., CASES AND MATERIALS ON LAND USE, *supra* note 2, at ch. 4; JULIAN CONRAD JUERGENSMEYER, FUNDING INFRASTRUCTURE: PAYING THE COSTS OF GROWTH THROUGH IMPACT FEES AND OTHER LAND REGULATION CHARGES (James C. Nicholas ed., 1985) [hereinafter JUERGENSMEYER, FUNDING INFRASTRUCTURE]; Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 WASH. U. J. URB. & CONTEMP. L. 28 (1990); David L. Callies, *Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295 (1989) [hereinafter Callies, *Impact Fees*].

so-called "rational nexus" test developed by the courts in Florida and other jurisdictions that have considered such fees and exactions.[30] First proposed in 1964,[31] it became the national standard by the end of the 1970s.[32] The test essentially has two parts. First, the particular development must generate a need to which the amount of the exaction bears some rough proportionate relationship. Second, the local government must demonstrate that the fees levied will actually be used for the purpose collected.[33]

This test was made applicable to all land development conditions by the United States Supreme Court in 1987. Decided on the last day of the Court's 1987 term, *Nollan v. California Coastal Commission*[34] deals ostensibly with beach access. Property owners, James and Marilyn Nollan, sought a coastal development permit from the California Coastal Commission to tear down a beach house and build a bigger one. The commission granted the permit only upon condition that the owners give the general public the right to walk across the owners' backyard beach area, an easement over one-third of the lot's total area. The purpose, the commission said, was to preserve visual access to the water, which was impaired by the much bigger beach house. The Court, however, held that, assuming the commission's purpose to overcome the psychological barrier to the beach created by overdevelopment was a valid public purpose, it could not accept that there was any *nexus* between that interest or purpose and the public lateral access or easement condition attached to the permit.[35]

The Court stated, however, that it is an altogether different matter if there is an "essential nexus" between the condition and what the land-

30. *See, e.g.*, Hernando County v. Budget Inns of Fla., Inc., 555 So. 2d 1319 (Fla. Dist. Ct. App. 1990); Frisella v. Town of Farmington, 550 A.2d 102 (N.H. 1988); Baltica Constr. Co. v. Planning Bd. of Franklin Twp., 537 A.2d 319 (N.J. Super. Ct. App. Div. 1987); Batch v. Town of Chapel Hill, 387 S.E.2d 655 (N.C. 1990); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988).

31. Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); *see also* Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions, in* DEVELOPMENT EXACTIONS (Frank & Rhodes ed. 1987) [hereinafter Bosselman & Stroud, *Legal Aspects*].

32. *See* Bosselman & Stroud, *Legal Aspects, supra* note 31, at 74.

33. Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA. L. REV. 381, 397-99 (1985) [hereinafter Bosselman & Stroud, *Mandatory Tithes*]; *see also* Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277 (N.J. 1990).

34. 483 U.S. 825 (1987).

35. *Id.* at 838-39. For full discussion see J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002).

owner proposes to do with the property.[36] Thus, local governments must consider several important factors when levying impact fees:

1. The fees must generally be charged as part of the land *development* process, not the land reclassification or rezoning process. Fees are development-driven, and land reclassification, while it may well be a prelude to development, does not create any need for public facilities whatsoever.[37]
2. Collected fees do not belong in the general fund, or the need is questionable.
3. The fees cannot be kept by government indefinitely, or the need is questionable.

Ignoring the foregoing raises a presumption, as a matter of both law and policy, that the impact fee is nothing more than a revenue-raising device, either for a facility that has nothing to do with the land development upon which the fee is raised, or for undetermined fiscal purposes generally. In either case, the "fee" is then presumed to be a tax. This characterization as a tax is almost always fatal to an impact fee since most local governments have very little specific authority to tax beyond the property tax and, occasionally, a sales or income tax. Because an impact fee is none of the above, and because all local government taxes must be supported by specific statutory authority, the fee is almost always declared illegal.[38]

The *Nollan* Court did not discuss the required degree of connection between the exaction imposed and the projected impacts of the proposed development. This issue was left open until 1994 when the United States Supreme Court decided *Dolan v. City of Tigard*.[39] In this

36. *Nollan*, 483 U.S. at 836-37; *see also* CALLIES ET AL., CASES AND MATERIALS ON LAND USE, *supra* note 2; Bosselman & Stroud, *Mandatory Tithes*, *supra* note 33; Brenda Valla, *Linkage: The Next Stop in Developing Exactions*, 2 GROWTH MGMT. STUD. NEWSL. 4 (1987); Callies, *Impact Fees*, *supra* note 29; Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis*, 50 L. & CONTEMP. PROBS. 127 (1987); Rachelle Alterman, *Evaluating Linkage and Beyond*, 32 WASH. U.J. URB. & CONTEMP. L. 3 (1988). *But see Holmdel Builders Ass'n*, 583 A.2d 277(upholding impact fees for housing as functional equivalents of mandatory set-asides, which the court had already approved under New Jersey's constitutionally based "fair share" doctrine).

37. Although in California such fees are charged when land is rezoned to planned unit development (PUD), a special zone in most jurisdictions, often carrying with it developmental rights.

38. *See, e.g.*, Home Builders Ass'n of Cent. Ariz., Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973); Town of Longboat Key v. Lands End Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982) . *See generally* JUERGENSMEYER, FUNDING INFRASTRUCTURE, *supra* note 29; Robert M. Blake & Julian C. Juergensmeyer, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 247 LAND USE & ENVTL. L. REV. 14 (1987).

39. 512 U.S. 374 (1994).

5-4 decision, the Court held for the first time that a city must demonstrate a "reasonable relationship" between the conditions imposed on a development permit and the development's impact.[40]

Florence Dolan owned a plumbing business and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flowed through the southwestern corner of the lot and along its western boundary. Dolan applied to the city for a building permit to double the size of the store and pave the 39-space parking lot. To mitigate for increased runoff from her property that would result from her expansion plans, the commission required that Dolan dedicate to the city the portion of her property lying within the 100-year flood plain along Fanno Creek for a public greenway. To mitigate for increased traffic and congestion caused by an increase in visitors to her store, the commission also required that Dolan dedicate an additional 15-foot strip of land adjacent to the flood plain as a public pedestrian and bicycle pathway.

While in *Dolan* there was a clear nexus between the impact of the proposed development and the conditions required by the commission, the Supreme Court adds a second test beyond "nexus": whether the degree or amount of the exactions demanded by the city's permit conditions were sufficiently related to the projected impact of the development proposed. The Court coined the term "rough proportionality" to describe the required relationship between the exactions and the projected impact of the proposed development.[41] While "[n]o precise mathematical calculation is required . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[42]

The Court reviewed the exactions (the two required dedications, of the public greenway and the pedestrian and bicycle pathway) and found that the city's burden on the development was not roughly proportional to the adverse effects the development would create. Therefore, the exactions were unconstitutional.

Together, *Nollan* and *Dolan* require that to pass constitutional muster, land development conditions imposed by government must:

40. *Id.* at 390.

41. *Id.* at 391. After coining the term "rough proportionality," the Court, in its majority opinion, never used that term again when it applied its decision to the facts; instead it continued to use the words "required reasonable relationship" or "reasonably related." Notably, the Court rejected stricter standards as the constitutional norm. *See* Herron v. Mayor of Annapolis, 388 F. Supp. 2d 565, 570-71 (D. Md. 2005).

42. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

1. Seek to promote a legitimate state interest;
2. Be related to the land development project upon which they are being levied by means of a rational or essential nexus; and
3. Be proportional to the need or problem which the land development project is expected to cause, and the project must accordingly benefit from the condition imposed.

Under the first standard, legitimate state interest, an agency may only require a landowner to dedicate land (or interests in land) or contribute money for public projects and purposes, such as public facilities and, in most jurisdictions, public housing.

Under the second standard, essential nexus, an agency must find a close connection between the need or problem generated by the proposed development and the land or other exaction or fee required from the landowner or developer. Thus, for example, a residential development will in all probability generate a need for public schools and parks. A shopping center or hotel in all probability will not. Both will generate additional traffic and therefore generate a need for more streets and roads.

Under the third standard, proportionality, a residential development of, say, three hundred units may well generate a need for additional classroom space, but almost certainly, not a new school or school site. On the other hand, such a residential development of several thousand units would, when constructed, likely generate a need for a new school and school site, depending upon the demographics of the new residents.

C. *A Constitutional Issue: Nexus*

Because linkage fees for affordable or workforce housing are a form of exaction, they are subject to the "essential nexus" takings test of *Nollan*.[43] Under *Nollan*, "a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[44] In addition, under *Nollan*, the government bears the burden of proving this nexus.[45] Linkage fees satisfy this test "only if

43. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); *see* Commercial Builders of N. Cal. v. Sacramento, 941 F.2d 872, 874 (9th Cir. 1991).
44. *Nollan*, 483 U.S. at 836 (emphasis added).
45. *Dolan*, 512 U.S. 391 n.8 (citing *Nollan*, 483 U.S. at 836).

the municipality can show that development contributes to the housing problem[46] the linkage exaction is intended to remedy."[47]

There is no disagreement that *Nollan*'s nexus test, or its close equivalent, applies to linkage fees. For example, in *Commercial Builders of Northern California v. Sacramento*,[48] the Ninth Circuit held that an ordinance which imposed a linkage "fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs,"[49] (in other words, a workforce affordable housing requirement) was constitutional under *Nollan*.[50] Plaintiffs challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. First, the court addressed the holding of *Nollan*. *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.[51] The court then explained that "the [o]rdinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed."[52]

The Court related at some length what the City of Sacramento did to establish the "substantial connection between the development and the problem" of affordable housing. First, it commissioned a study of the need for low-income housing, the effect of non-residential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such developments to pay for housing:

> [The study] estimat[ed] the percentage of new workers in the developments that would qualify as low-income workers and would require housing. [The study] also calculated fees for development . . . Also as instructed, however, in the interest of

46. MANDELKER, LAND USE LAW, *supra* note 1, at § 9.23. A "housing problem" is the typical interest which the counties of Hawai'i identify as a legitimate state interest in their ordinances. *See, e.g.*, MAUI, HAW., CODE § 2.94.010 (2007) ("The council finds that there is a critical shortage of affordable housing in the county."); HAWAII, HAW., CODE § 11-2(5) (2010) (setting forth the objective of "Requir[ing] large resort and industrial enterprises to address related affordable housing needs as a condition of rezoning approvals, based upon current economic and housing conditions"). In *Ass'n of Owners v. Honolulu*, 742 P.2d 974 (Haw. Ct. App. 1987), the Intermediate Court of Appeals of Hawai'i acknowledged the legitimacy of this interest in the context of the challenge to a condominium declaration, stating that "affordable housing and public parking for downtown Honolulu were important to the welfare of the community." *Id.* at 985.

47. MANDELKER, LAND USE LAW, *supra* note 1, at § 9.23.

48. 941 F.2d 872 (9th Cir. 1991).

49. *Id.* at 873 (emphasis added).

50. *Id.* at 875.

51. *Id.*

52. *Id.*

> erring on the side of conservatism in exacting the fees, it reduced [the] final calculation[] by about one-half. *Based upon this study*, the City of Sacramento enacted the Housing Trust Fund Ordinance [which] . . . included the finding that *nonresidential* development is 'a major factor in attracting new employees to the region' and that the influx of new employees '*creates a need for additional housing in the City.' Pursuant to these findings*, the Ordinance imposes a fee in connection with *the issuance of permits* for *nonresidential* development *of the type that will generate jobs*.[53]

Consequently, the court found "that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster."[54]

Even courts that decline to apply heightened scrutiny to legislatively imposed fees nonetheless apply some form of *Nollan*'s essential nexus test. For instance, in *San Remo Hotel L.P. v. City & County of San Francisco*,[55] although the California Supreme Court reaffirmed that legislatively imposed, ministerial impact fees are not subject to the tests of *Nollan/Dolan*,[56] the court nonetheless required that there "be a 'reasonable relationship' between the fee and the deleterious impacts for the mitigation of which the fee is collected."[57] Similarly, in *Holmdel Builders Association v. Township of Holmdel*,[58] although the Supreme Court of New Jersey concluded that legislative fees are not subject to the heightened scrutiny of its "but-for," "rational-nexus" test, it still required some relationship between the development and the harm caused.[59] The court essentially explained that the "relationship between the private activity that gives rise to the exaction and the public activity to which it is applied," must be "founded on [an] actual, albeit indirect and general, impact. . . ."[60]

The California Court of Appeals echoes the decision in *San Remo* by denying the *Nollan/Dolan* strict scrutiny test to a legislatively enacted ordinance but still requiring a reasonable relationship between the ordinance's means and ends.[61] In *Building Industrial Ass'n of Central California v. City of Patterson*, the city entered into a development agreement that provided for an affordable housing in-lieu fee of $734

53. *Commercial Builders of N. Cal.*, 941 F.2d at 873.
54. *Id.* at 875.
55. 41 P.3d 87 (Cal. 2002).
56. *Id.* at 102-03.
57. *Id.* at 103 (citations omitted).
58. 583 A.2d 277 (N.J. 1990).
59. *Id.* at 288.
60. *Id.*
61. Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson, 90 Cal. Rptr. 3d 63 (Ct. App. 2009).

per market rate unit to be paid by the developer to the city with a caveat that allowed for a "reasonably justified" increase in the fee based on the findings of an updated affordable housing fee analysis.[62] In accordance with the updated analysis, the city raised the affordable housing fee from $734 to $20,946 per market rate unit.[63] The court held that the development agreement's increased affordable housing in-lieu fee was not "reasonably justified" because the fee had no reasonable relationship to the "deleterious public impact" the planned sub-division would have on affordable housing.[64] Although the court's ruling only held that the development agreement's increased affordable housing in-lieu fee was not reasonably justified and thus impermissible, the language of the court's decision goes much further than this development agreement.[65]

In developing the affordable housing in-lieu fee, the city examined subsidies that would bridge the affordability gap between moderate, low-, and very low-income households and the price of market rate units. The city calculated the total subsidy that would be required to bridge the affordability gap based on the requirement of 642 units of affordable housing allocated to the city by the 2001 to 2002 Regional Housing Needs Assessment for Stanislaus County. This total subsidy of $73.5 million was spread over the 3,507 unentitled units left to be constructed according to the city's general plan. Although this calculation has a direct relationship to the city's overall need for affordable housing, it has no relationship to the effects of a new development on the need for affordable housing.

While the court never comments on the constitutionality of the original fee,[66] in concluding that the increased fee violated the development agreement, the court clearly finds that even outside of the development agreement context, the new in-lieu housing fee is impermissible; "the fee calculations . . . do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project."[67]

62. *Id.*
63. *Id.*
64. *Id.* at 73.
65. "The level of constitutional scrutiny applied by the court in *San Remo Hotel* must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement." *Id.*
66. *City of Patterson*, 90 Cal. Rptr. 3d at 67-68 (discussing where the affordable housing fee would be used as leverage with the federal government to receive grants and loans).
67. *Id.* at 74.

Notably, the only part of the *Nollan* test that was not applied in *San Remo* or *Holmdel Builders Association*, is the shifting of the burden of proof to the government. While unclear in *Nollan*, the Court clarified in *Dolan* that the burden of proof shifts to the government. There, the Court cited to *Nollan* when it said that "the burden properly rests on the city."[68] What is important, however, is that *all* jurisdictions at least require some form of nexus between the harm caused by the development and the interest that the exaction purportedly serves. Thus, even under the California or New Jersey approach, *Nollan*'s requirement that the "same" interest be served by the exaction[69] still applies, albeit in different terms.

D. *A Constitutional Issue: Proportionality*

Provided the regulation satisfies the nexus requirement, the second issue is what reasonable percentage of affordable or workforce housing will meet the constitutional proportionality test under *Dolan* or some similar proportionality requirement. As one recent commentator noted: "[a]n inclusionary zoning ordinance deserves . . . judicial deference . . . provided that the program addresses a lack of affordable housing *at a level proportionate to each development and it can be defended through sufficient planning by each municipality.*"[70] Much is clearly dependent upon the circumstances in each case, but as one treatise on land use has observed, while "set-aside percentages and development size requirements vary across the country[,] [m]ost set-asides range from ten to twenty percent."[71]

Concern over a shrinking workforce and hopes of "enhanc[ing] the public welfare by ensuring that the housing needs of the County are addressed," led the Maui County Council to pass Ordinance 3418, Maui County's Residential Workforce Housing Policy.[72] By far the most burdensome housing policy in the country, Ordinance 3418 requires developers to set aside up to 50% of new units for affordable housing needs.[73]

68. Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987)).

69. *Nollan*, 483 U.S. at 836.

70. Brian Lerman, *Mandatory Inclusionary Zoning–The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 398-99 (2006) (emphasis added).

71. ZONING AND LAND USE CONTROLS, ch. 3, § 3.07[3] (2007).

72. MAUI, HAW. CODE § 2.96.010 (2007).

73. "Most cities require ten or fifteen percent of the [newly constructed] housing be affordable . . . with the most aggressive city requiring thirty-five percent affordability. *See* Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F.L. REV. 971 (2002).

Any development that seeks a final subdivision or building permit approval for five or more new dwelling units or lots may be held to the requirements of the ordinance.[74] Furthermore, any hotel development or renovation that converts one or more hotel units into dwelling units or increases the number of total units in the hotel falls under the scope of the ordinance.[75]

Depending upon the expected sales price of the units in the development, the developer will be required to set aside 40 or 50% of the units to affordable housing.[76] If 50% or more of the units will be sold at a price below $600,000, a 40% set aside is required, while a 50% set aside is required for developments expecting to sell at least 50% of the units for more than $600,000.[77] The ordinance does, however, provide a developer with an appeals process to reduce, adjust, or waive the requirements of the ordinance if there is no "reasonable relationship or nexus between the impact of the development" and the required set aside.[78]

To comply with these set aside requirements, developers may offer for sale or rent single or multi-family dwelling units "as residential workforce housing within the community plan area" or can convey these units to a qualified housing provider who will then sell or rent the units as residential workforce housing.[79] In lieu of providing these affordable housing units, the developer may choose to pay fees or dedicate improved land equivalent to "thirty percent of the average projected sales price of the market rate dwelling units and/or new lots in the development."[80] The developer may also dedicate unimproved land in lieu of providing affordable housing units; however, the value of unimproved land must be twice that of an improved land dedication.[81]

Since its December 2006 enactment, the ordinance has been challenged in federal district court[82] by a Maui developer who had planned two multi-family residential projects, but determined that development would be economically infeasible under the ordinance. Developer Kamaole Pointe appealed to the council for a waiver from the ordinance,

74. MAUI, HAW. CODE § 2.96.030 (2007).
75. *Id.*
76. *Id.* § 2.96.040.
77. *Id.*
78. *Id.* § 2.96.030.
79. MAUI, HAW. CODE § 2.96.040(B) (2007).
80. *Id.* § 2.96.040(B)(4)(a).
81. *Id.* § 2.96.040(B)(4)(b).
82. *See* Kamaole Pointe Dev. L.P. v. County of Maui, No. 07-00447 DAE-LEK, 2008 U.S. Dist. LEXIS 96388 (D. Haw. Nov. 25, 2008).

which was denied when the council found a "reasonable nexus between the impact of the . . . proposed developments and the need for affordable housing on Maui."[83] The federal district court dismissed Kamaole Pointe's claims without ruling on the constitutionality of the ordinance, finding the claims to be unripe.[84] Even if the court tried the case on the merits and found a nexus between the development and the need for affordable housing, it would be hard pressed to find proportionality in an ordinance that requires 40 or 50% set-asides while offering no palpable incentives other than fast-track permitting.

A mandated review of the ordinance required every two years may render the *Kamaole Pointe* case moot. The Maui County Council conducted its first obligatory review of the housing policy in February 2009. While stopping short of demanding a repeal of the ordinance, developers and nonprofit builders called for its amendment pointing to the "lack of homes built in the past two years [which] proves the ordinance is flawed, and the economic downturn necessitates extra incentives to build."[85] Developers suggested ideas for amending the ordinance such as lowering the set aside requirement to 30 to 40%, allowing for a faster permitting process, and providing more transferable housing credits to nonprofit builders.[86]

The author of the ordinance maintains that the program is a success, pointing to the approval of over a thousand units under the ordinance's provisions.[87] He conceded, however, that the ordinance was designed to help working families, a goal that it has so far failed to meet.[88]

E. *A Review of Cases Upholding Inclusionary Affordable Housing Programs*

The handful of cases upholding inclusionary housing programs is easily distinguishable. *Commercial Builders of Northern California v. City of Sacramento* is already discussed above where the Ninth Circuit held

83. *Id.* at *3-4.
84. *Id.* at *22.
85. Chris Hamilton, *Council Reviews Housing Statute: Critics Say the Measure Needs Tweaking*, MAUI NEWS, Feb. 17, 2009, *available at http://www.mauinews.com/page/content.detail/id/514978.html?nav=10.*
86. *See id.*
87. *See id.*
88. "Council Members Danny Mateo and Joe Pontanilla rendered their verdicts on the first two years of the Residential Workforce Housing ordinance Wednesday: It isn't working for the gap group of working families." *See* Harry Eagar, *County Housing Plan Scrutinized*, MAUI NEWS, Feb. 19, 2009, *available at http://www.mauinews.com/page/content.detail/id/515071.html.*

that a City of Sacramento ordinance was constitutional under *Nollan*. To reiterate:

> We . . . agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*.[89]

Also, in *Home Builders Ass'n of Northern California v. City of Napa*,[90] the city enacted an inclusionary zoning ordinance requiring 10% of all newly constructed units be affordable, but again only after the city made significant findings and studied possible affordable housing solutions, much like the City of Sacramento.[91] Moreover, the court specifically recognized that "The City's inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property."[92] Therefore, the court noted specifically that "the ordinance also provides significant benefits to those who comply with its terms . . . expedited processing, fee deferrals, loans or grants and density bonuses."[93] Note also that the municipality provided over 700 pages of documentation for its program, and set its required set-aside at only 10%. The continued viability of this decision is questionable following the *City of Patterson* decision.[94]

Moreover, these decisions must be read in the context of California's Density Bonus Law which requires local governments to "reward developers that agree to build a certain percentage of low-income housing" with increased density bonuses above those permitted by applicable local regulations.[95] While the Density Bonus Law can, by itself, be considered a voluntary inclusionary zoning program, these density bonus mandates are then tacked on to those already provided by a local government's inclusionary zoning program.[96] Therefore developers build-

89. Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991).
90. 108 Cal. Rptr. 2d 60 (Ct. App. 2001).
91. *Id.* at 62.
92. *Id.* at 64.
93. *Id.*
94. *See* Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson, 90 Cal. Rptr. 3d 63 (Ct. App. 2009).
95. Shea Homes L.P. v. Cnty. of Alameda, 2 Cal. Rptr. 3d 739 (Ct. App. 2003).
96. BARBARA A. KAUTZ, A PUBLIC AGENCY GUIDE TO CALIFORNIA DENSITY BONUS LAW (2005).

ing in jurisdictions that impose inclusionary zoning ordinances have a state guaranteed avenue to mitigate the burdens of providing affordable housing required by local governments, and developers who build in jurisdictions without inclusionary zoning programs nonetheless have incentives to build affordable housing.

California Code section 6915 requires local governments to provide applicants who "seek and agree to construct a housing development" containing at least 5% of the units affordable to very low-income households or 10% of the units affordable to lower-income households with at least a 20% density bonus.[97] Developers may also set aside 10% moderate-income affordable units but will only receive a 5% density bonus.[98] In order to create better incentives for developers to produce affordable housing, the Density Bonus Law offers increased density bonuses on a sliding scale for developers who meet and surpass the minimum set-aside requirements.[99] Depending upon the type of affordable unit set aside, developers will receive a higher percent density bonus for every percent increase in affordable housing they offer above the minimum threshold. The developer will earn an increased density bonus of 2.5% for every percent of very low-income housing set-aside, 1.5% for every percent of lower-income housing set-aside, and 1% for every percent of moderate-income housing set-aside.[100] These density bonuses are capped at 35%. Thus, a developer who sets aside 11% of the development's units for very low-income units, 20% lower-income units, or forty moderate-income units will earn the maximum density bonus.[101] Although the mandatory density bonus award under the state's Density Bonus Law is capped at 35%, this maximum cannot be "construed to prohibit a [local government] from granting a density bonus greater" than that required by state law.[102]

California Code section 65915 also requires local governments to provide developers who meet the above mentioned minimum set-aside requirements with incentives or concessions that "result in identifiable, financially sufficient, and actual cost reductions."[103] These concessions and incentives include, but are not limited to, (1) reductions in development standards, (2) modifications of zoning or building code require-

97. CAL. GOV'T CODE § 65915(b)(1) (West 2008).
98. *Id.*
99. *Id.* § 65915(f).
100. *Id.* § 65915(f)(1)-(4).
101. *Id.*
102. CAL. GOV'T CODE § 65915(n) (West 2008).
103. *Id.* § 65915(k).

ments, and (3) "approval of mixed use zoning in conjunction with the housing project" if it is compatible with the project and will reduce costs.[104] Local governments are required to provide developers with one concession or incentive for every 10% of the total units dedicated to lower-income households, 5% to very low-income households, or 10% to moderate-income households.[105] However, a developer may only receive up to three concessions or incentives.[106]

Furthermore, in a recent interpretation of the *Napa Valley* case, a California superior court held that where a city (there, San Diego) fails to provide for a review of the constitutionality of a housing set-aside as a ground for waiving it, "the ordinance on its face results in an unconstitutional taking. . . ."[107] The court reasoned:

> [O]n its face, the ordinance does not provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development or nexus between the impact of the development and the inclusionary requirement. *The city can, therefore, impose the inclusionary requirement on a development not reasonably related to the need for that requirement. Inasmuch as [this] does not allow the City to avoid the unconstitutional application of the ordinance, the ordinance on its face results in an unconstitutional taking.*[108]

F. *Worth the Trouble? Surveys of Experience and Practice*

Given the constitutional problems with mandatory affordable housing set-asides, are they worth creating and implementing? Based on relatively recent reports and surveys, the answer is no—at least, not without substantial incentives. While there are anecdotal reports of experience with inclusionary zoning/mandatory housing set-asides in other jurisdictions, a recent report from California is in all likelihood the most relevant, recent and comprehensive. In that study[109] the authors surveyed (by questionnaire) 107 local governments in California known to have formal inclusionary zoning programs. Ninety-eight responded by 2003. Among the report's key findings:

1. Density bonuses are by far the most popular incentive offered to developers to build affordable housing, reported by 91% of the

104. *Id.* § 65915(l).
105. *Id.* § 65915(d)(2).
106. *Id.*
107. Bldg. Indus. Ass'n of San Diego County, Inc. v. City of San Diego, No. GIC817064, 2006 WL 1666822, at *2 (Cal. App. Dep't Super. Ct. May 24, 2006).
108. *Id.* (emphasis added).
109. NON-PROFIT HOUS. ASS'N OF N. CAL., CAL. COAL. FOR RURAL HOUS., INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION (2004).

programs. "The mean percentage of affordable housing required [for a density bonus] . . . is 13% . . . half of all programs require at least 15%, of which nearly one-quarter of the programs require 20% or more. *The most frequent inclusionary percentage is 10% (44% of jurisdictions).*"[110]

2. The fast-track permit processing incentive is offered by 44% of the jurisdictions surveyed.
3. Monetary subsidies are offered by 43% of the jurisdictions as an incentive.
4. Other prevalent incentives include: fee waivers (38%), reductions (32%) and deferrals (25%).
5. Programs "typically offer developers one or more alternatives to constructing affordable units within the market-rate project. Most common is paying fees in-lieu of construction, offered by 81% of the reporting programs . . . in two-thirds of the programs, developers are permitted to construct affordable units off-site."[111]

The report ends with the following cautionary observations: "[I]f builders can't or won't build, then an inclusionary program is rendered virtually meaningless. Accordingly, program design and revision must consider both the benefits and potential limitations of each policy detail."[112]

As a response to the continued popularity and adoption of inclusionary zoning ordinances in California, the Non-Profit Housing Association did a follow-up study to the 2003 report. The most "astounding finding of *Affordable By Choice: Trends in California Inclusionary Housing Programs*[113] is the pace at which inclusionary housing programs are being adopted in California." In less than 4 years, 63 jurisdictions adopted inclusionary zoning ordinances bringing the total California jurisdictions employing inclusionary policies up to 170.[114] This report, which combines data collected for the 2003 report and a subsequent survey in 2006, states 5 key findings:

1. Nearly one-third of California jurisdictions now have inclusionary programs.
2. While more than 80,000 people have housing through these programs, this translates into about 20,000 units across the entire state.

110. *See id.* at iii (emphasis added).
111. *Id.* at iv.
112. *Id.* at 5.
113. NICK CALAVITAS, AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS (2007).
114. *See id.* at 3.

3. Most of the affordable units produced are integrated within market rate developments.
4. Affordable units serve those most in need. Approximately three quarters of the affordable units produced are affordable to those with the lowest incomes rather than those with moderate incomes.
5. Partnerships between market rate developers and affordable housing developers have been utilized to serve the lower income households.[115]

Some of this extensive experience in California is reflected in other jurisdictions, particularly in terms of the average rate of set-aside and the prevalence of density bonuses. Perhaps the most current source of such further data is contained in a survey for the Urban Land Institute (ULI).[116] The introductory materials note that inclusionary zoning is not a particularly productive or efficient way of approaching our national crisis in affordable housing. Thus for example, the highly rated program in Montgomery County, Maryland produces only about 8% of the total yearly addition to the county's stock of affordable housing. In the oft-touted Boston program, of the 20,340 subsidized low-income housing units produced between 1990 and 1997, a mere 1,200 came from inclusionary zoning programs.

Of course this number must be viewed against Massachusetts's statewide statutory provision that grants developers density bonuses without having to invoke inclusionary zoning ordinances.[117] Massachusetts's Chapter 40B[118] allows developers who provide a minimum amount of housing affordable to low- and moderate-income households to receive building permits under an expedited process, which allow the developer to build housing without regard for the zoning requirements or any other locally adopted regulations.[119] This statute is invoked by both non-profit developers building entirely affordable projects as well as for profit developers who desire to build at higher densities than

115. *See id.* at 5.

116. DOUGLAS PORTER, INCLUSIONARY ZONING FOR AFFORDABLE HOUSING (2004).

117. *See* JENNY SCHUETZ, RACHEL MELTZER & VICKI BEEN, THE EFFECTS OF INCLUSIONARY ZONING ON HOUSING MARKETS: LESSONS FROM THE SAN FRANCISCO, WASHINGTON DC AND SUBURBAN BOSTON AREAS (2007) [hereinafter EFFECTS OF INCLUSIONARY ZONING].

118. MASS. GEN. LAWS ch. 40B (2009).

119. BRIAN BLAESSER, ET AL., INCLUSIONARY ZONING: LESSONS LEARNED IN MASSACHUSETTS (2002), *available at* http://www.mhp.net/uploads/resources/inclusionary_zoning__lessons_learned.pdf.

would otherwise be allowed under the local zoning ordinance.[120] It is true that, like Boston, California offers the density bonus provisions through state legislation for developers who voluntarily set aside affordable housing, however, unlike Massachusetts's Chapter 40B, California's legislation supplements the provisions of municipal inclusionary ordinances.[121] While California developers are still required to set aside housing for affordable housing in accordance with local inclusionary zoning ordinances, approximately 80% of all affordable housing production in Boston is created under Chapter 40B instead of local inclusionary ordinances.[122]

The 2004 ULI report further notes that all the programs surveyed provide some sort of bonus to developers who set aside part of their projects for affordable/workforce housing. Some other examples of programs that provide bonuses: Fairfax, Virginia, 10 to 20% density bonuses plus relaxed setback and yard requirements; Longmont, Colorado, up to 20% density bonuses; Burlington, Vermont, 15 to 25% density bonuses; Cambridge, Massachusetts, 15% density bonuses; Somerville, Massachusetts, 20% density bonuses; Ft. Collins, Colorado, negotiable density bonuses plus expedited/waived development processes; Denver, Colorado, cash payments ranging from $5,000 to $10,000 per affordable unit, plus negotiated density bonuses.[123] Other communities are reportedly even more generous with respect to bonuses and incentives for affordable housing: Highland Park, Illinois, one additional market-rate unit for each affordable unit constructed, plus waiver of building permit, sewer/water tap-on, and impact fees for affordable units.

In sum, experience in those jurisdictions that have set-aside programs indicates they have so far been only moderately successful in producing affordable housing when compared to total volume of housing and total state population, and virtually all programs provide for generous bonuses to developers providing such housing.

II. Conclusion

There are virtually no instances of courts countenancing naked linkage or affordable housing set-aside requirements on residential developments without substantial bonuses, usually consisting of significant density increases. Indeed, a recent report from a nonprofit coalition on

120. EFFECTS OF INCLUSIONARY ZONING, *supra* note 117.
121. *Id.* at 30.
122. *Id.*
123. PORTER, *supra* note 116.

housing in California concludes that most California local governments with inclusionary affordable housing programs provide a range of substantial density bonuses and other advantages to developers required to provide affordable housing, and the average percentage of such housing requirements is closer to 10%, with 20% being at the high end of the spectrum. This experience is replicated in other surveys of other jurisdictions.

As to workforce housing exactions or set-asides on commercial development, the principal—indeed virtually only—federal case approving such set-asides did so only after the local government requiring such set-asides engaged in thorough and detailed studies of the workforce jobs required and generated by the proposed commercial development, which requirements were then cut in half. If government wishes to enact an ordinance mandating affordable housing set-asides or fees on commercial development (not zoning, but actual development) despite evidence of marginal success in actively providing affordable housing, then it should consider the basis upon which the Ninth Circuit Court of Appeals upheld such an ordinance passed by the City of Sacramento and:

1. Undertake a detailed study of the precise need for workforce housing;
2. On a project by project basis;
3. Calculate the precise fee or set-aside each project requires;
4. Cut that fee in half before applying it to a given project;
5. Provide meaningful density bonuses, expedited permitting and grants.[124]

Thus, provided the percentage is (1) applied to developments that drive a need for affordable housing, and (2) set low enough to survive a proportionality challenge, this may then produce a percentage—although likely not a large one—of the affordable, low income, workforce housing needs of the community.[125]

124. *See* Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).

125. For a thorough analysis of set asides in the context of proportionate share theory and practice, see ARTHUR C. NELSON, ET AL., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY (2008).